In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 358

EUGENE J. HANON, GLORIA MEYER AND JOHN L. BOVERI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Missouri petitioner Boveri was convicted of use of interstate facilities to promote an illegal gambling enterprise, in violation of 18 U.S.C. 1952, and all petitioners were convicted of conspiracy to violate this statute.[1] Boveri was sentenced to a total of five years' imprisonment and fined $10,000; Hanon was sentenced to three years' imprisonment and fined $5,000; and Meyer was sentenced to two years' imprisonment. On appeal, a panel of the court reversed the judgments of conviction, but on

[1] A fourth defendant was also convicted of conspiracy but did not appeal.

403-002—70

rehearing *en banc,* the court of appeals, with two judges dissenting, affirmed the judgments.

The evidence showed a bookmaking operation, illegal under state law, which made use of interstate facilities. In proving its case, the government introduced into evidence gambling records which had been seized under federal search warrants asserting violations of the federal wagering tax laws. The affidavits supporting the warrants recited detailed facts showing that each petitioner was engaged in wagering activities (A. 18–65),[2] and stated that each had not purchased a wagering tax stamp. The warrants were executed in July 1967, prior to the decisions in *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62. There was thus probable cause for their issuance at that time under *United States* v. *Kahriger,* 345 U.S. 22, and *Lewis* v. *United States,* 348 U.S. 419. The issue here is whether the subsequent decisions in *Marchetti* and *Grosso* nevertheless require exclusion of evidence seized pursuant to the warrants because they were based upon asserted violations of the wagering tax laws.[3] We submit they do not.

In *Marchetti* and *Grosso,* this Court held only that those who properly assert a Fifth Amendment privilege against self-incrimination may not be criminally convicted for failure to register or pay occupational and excise taxes under the wagering tax laws. Petitioners have not, of course, been convicted for any such failure, but rather for other gambling violations

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[2] "A." refers to the appendix before the court of appeals.

[3] The same question is raised in *Kuhn* v. *United States,* No. 5088, this Term.

that raise no constitutional question. Thus, their only complaint is that the search warrants were based upon allegations of violations for which they could not have been convicted if they had been charged and properly asserted the privilege. They do not deny that the warrants were based upon probable cause as the law then stood. Nor were the warrants based upon any information supplied by petitioners. Under these circumstances, the relationship between petitioners' convictions and the vice found in *Marchetti* and *Grosso* is too tenuous to affect the validity of these convictions.

In any event, acceptance of petitioners' contention would require retroactive application of *Marchetti* and *Grosso,* something that we submit should not be done in such a collateral situation as this, where the effect would be to deprive the government of the use of reliable evidence that was entirely lawful when obtained. See *Desist* v. *United States,* 394 U.S. 244; *Tehan* v. *Shott,* 382 U.S. 406; see also *United States* v. *Wallace Co.,* 336 U.S. 793.[4]

United States v. *United States Coin and Currency in the Amount of $8,674, Donald Angelini, Claimant,* No. 5, this Term, presents the questions whether the decisions in *Marchetti* and *Grosso* should be applied to forfeiture proceedings directed against property used in violation of the federal wagering tax laws and, if so, whether the rule adopted in those cases should be applied where the seizures occurred

[4] In *Stanley* v. *Georgia,* 394 U.S. 557, 569, the concurring opinion of three members of this Court considered a similar warrant to be valid.

prior to the date of the decisions. Another question of collateral application of *Marchetti* and *Grosso* is presented in *Mackey* v. *United States,* No. 36, this Term.

For the reasons stated, the petition should be denied. However, since the issue here is related to those presented in *Angelini* and *Mackey,* the Court may wish to defer disposition of the petition until after those cases are decided.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1970.

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